DOCUMENT RESUME

ED 248 308 UD 023 793

AUTHOR Lines, Patricia
TITLE Serving the Unserved: The Historical and Legal Context. ECS Working Paper LEC-83-18.
INSTITUTION Education Commission of the States, Denver, Colo. Law and Education Center.
SPONS AGENCY Carnegie Corp. of New York, N.Y.; Ford Foundation, New York, N.Y.; National Inst. of Education (ED), Washington, DC.
PUB DATE Sep 83
GRANT NIE-400-81-0012
NOTE 29p.; For other papers in this series, see UD 023 787-792.
PUB TYPE Reports - Evaluative/Feasibility (142) -- Historical Materials (060) -- Information Analyses (070)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Educational Discrimination; Elementary Secondary Education; *Equal Education; Federal Government; *Government Role; Hispanic Americans; *Racial Segregation; School Desegregation; *State Government; *State Legislation

ABSTRACT

This paper reviews the historical and legal context of the drive for greater equity in education, with a focus on racial equality. An overview of other papers in this series is also presented. The conclusion is drawn that although considerable progress has been made in achieving greater racial equity in education, much remains to be done. Blacks have faced the greatest inequality historically, and efforts to correct this imbalance have met with the greatest opposition. Blacks today, however, are less likely to attend segregated schools than are Hispanics, the largest of the new immigrant groups. Hispanics historically have faced discrimination in education in the United States, and new immigrants face isolation due to poverty and lack of English language skills. The need for addressing their language needs, however, cannot justify any permanent segregation. While the Federal role has been important in the past, a new era of State leadership seems imminent. Thus, virtually all the States have adopted policies to address inequities in the schools. Some have exceeded the Federal government's, although some are weaker. States, however, may be in a better position to bring about lasting and sensible solutions to educational inequities. (Author/GC)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

SERVING THE UNSERVED:
THE HISTORICAL AND LEGAL CONTEXT

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

S. V. Allen
Ed. Comm. of the States

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

✓ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

UD023793

Copyright, 1983
Education Commission of the States

SERVING THE UNSERVED:
THE HISTORICAL AND LEGAL CONTEXT

LEC-83-18

by
Patricia M. Lines

Education Commission of the States
1860 Lincoln Street, Suite 300
Denver, Colorado 80295

September 1983

This paper was based upon work supported by the National Institute of Education under Grant No. 400-81-0012 and general grants from the Carnegie Corporation and the Ford Foundation to the Education Commission of the States (ECS). The opinions, findings, conclusions and views in this paper are the author's and do not necessarily reflect the positions of ECS or the supporting organizations.

ABSTRACT

This paper reviews the historical and legal context of the drive for greater equity in education, with a focus on racial equality. The author then provides an overview of the remaining papers in this series. She concludes that considerable progress has been made in achieving greater racial equity in education, but that much is yet to be done. She observes that Blacks have faced the greatest inequality, historically, and that efforts to correct this have met with the greatest opposition, including violence. However, Blacks today are less likely to attend segregated schools than Hispanics, the largest of the new immigrant groups. She observes that Hispanics have historically faced discrimination in education in America, and new immigrants face isolation due to poverty and lack of English language skills. The need for addressing their language needs cannot justify any kind of permanant racial segregation, however. She observes that the federal role has been important, but that the era of strong federal leadership may be over, and a new era of state leadership may be on its way. She notes that virtually all the states have adopted policies to address inequity in the schools. Some have exceeded the federal government's; some are weaker. States, however, may be in a better position to bring about more lasting and more sensible solutions to inequity in education opportunities.

CONTENTS

INTRODUCTION 1

AN HISTORICAL OVERVIEW 4
- Blacks: From Illiteracy to Segregated Schools 4
- The Road to Brown v. Board of Education 4
- The Post-Brown Era 5
- Other Minorities: Immigration And Language Isolation 7

THE LEGAL CONTEXT FOR STATE RESPONSIBILITY 8
- The Federal Constitution and State Liability 8
  - The Requirement of State Action 9
  - The Requirement of Intent 10
  - Elimination of Segregation "Root and Branch" 11
  - A Racially Neutral Policy 12
  - An End to Court Supervision 13
- A Review of Lower Court Decisions 13

THE GOAL OF INTEGRATED SCHOOLING 15

FOOTNOTES 19

SERVING THE UNSERVED:
THE HISTORICAL AND LEGAL CONTEXT

by Patricia M. Lines/*\

SERVE BETTER THOSE STUDENTS WHO ARE NOW UNSERVED OR UNDERSERVED

- Because the nation needs to draw upon the broadest base of talent, each state and local school system should make special efforts to increase participation by women and minority students in courses such as mathematics and science that are related to careers in which these groups are under represented.

- Each state and local school system must expand its programs or develop new ones to identify academically gifted students early in their school careers and to provide a curriculum that is rigorous and enriching enough to challenge talented young people.

  . . . .

- Each state and local school system should improve its programs for identifying and educating handicapped children, specifically including them in its goals of education for jobs and economic growth.

- Since underserved students tend to be concentrated in schools with limited resources, states should continue to strengthen programs aimed at more equitable distribution of educational resources.

--from Action for Excellence, Task Force on Education for Economic Growth, Education Commission of the States 1983/1\

INTRODUCTION

Equality in education has been high on the agenda of nationwide concerns since 1954. But circumstances change, and so do agendas. Much happened before and

since Brown v. Board of Education/2\ and the nation seems to be entering a new era. Brutal, open and unmitigated cruelty based on race has given way to subtle and covert discrimination. In comparison to the blatant discrimination found in earlier years, present discrimination may possibly even be laid to the doorstep of discrimination against the poor. This is not to say that it is time to abandon equity as a goal, but that it is time to approach the issue differently.

Also, as the extreme inequities faced by racial minorities have been partially mitigated over the past century, the nation has had time to examine the plight of other groups of unserved or underserved children -- girls, the academically gifted, and the handicapped. Each of these groups has its own unique problems, and approaches to improving the education opportunities of these groups have varied.

This collection of papers discusses state responses to problems of inequity in the public schools, with a paramount focus on inequities based on race or national origin. For a brief moment in history, from approximately 1964 until approximately 1972, goals of equity in education seemed best achieved through the federal government./3\ As a result, it became conventional wisdom that the federal government was always the better choice for implementing such goals.

But prior to that time, the chief legal tool for achieving equity in education (narrowly understood to mean school desegregation) was through private actions, relying on the federal constitution, or through state initiative. Recently, civil rights advocates have returned to these tools. In the interim, many states built up their capacity to deal with equity; many states adopted laws against segregation, and many states developed equal education opportunity offices to deal with the issue. It may well be that these state-level policies will provide the primary tools for combatting inequity in the future.

If the mood and attitude of the nation continues along the course set in 1969, beginning with the Nixon administration, the federal role in education will remain limited. Those who care about these concerns are taking a fresh look at the ability and willingness of state governments to deal with these issues. Some continue to wish that the "good old days" of the Kennedy and Johnson administrations would return. Others are willing to place their hopes upon the states.

Because the state role may become increasingly crucial to issues of equity, this collection of papers focuses almost exclusively on state law and state programs. It does not discuss federal law or programs except where these affect the state role, or provide insight to state policy. The paper by Belsches-Simmons reveals that there are and have long been civil rights laws in almost every state. Indeed, some states, such as Illinois and Massachusetts, preceded the federal government. Others demanded and continue to demand more from local districts in providing more equitable education opportunities; many state laws, including one in the South -- Kentucky's -- make racial imbalance illegal. Federal law has never gone this far; de jure, or intentional acts to segregate, must be proven under most federal legislation (although judicial interpretation may still alter this requirement). But many state legislatures removed the issue of intent from debate, by clearly requiring racial balance, or by prohibiting either direct or indirect methods of discrimination by race, color or nationality.

To fully understand the current policies of federal and state governments, it is useful to review the history of race relations and its impact on education in America. Over the long reaches of history, it is not at all clear that the federal government is the only catalyst -- or indeed always the best -- to promote goals of equity in education. It has played an important role at critical junctures, but has also often ignored the issues. Thus, the first section of this paper reviews the historical context of equity in education.

The legal context may explain some of the responses of states. In particular, more and more states are finding themselves joined as defendants in desegregation law suits. Some of these states are now facing court orders requiring them to finance a substantial part of the desegregation plan in one or more local school districts within the state. In the interest of preventive law, these states may well want to take a more active role in promoting desegregation in the future, not only to avoid such legal liability, but to better serve the unserved and the underserved. Thus, the second section of this paper discusses this legal context.

In the third section, this paper provides a very brief review of the other papers in this collection, and a commentary on how the goal of serving the unserved seems best achieved by those formulating state policies.

AN HISTORICAL OVERVIEW

Blacks: From Illiteracy to Segregated Schools

Progress in race relations in America, depending on perspective, has gone forward at a dizzying speed, or has plodded along at an agonizingly slow pace. In broad perspective, progress has been extraordinary. Slave traders violently captured and brought Africans to this country. Attempts to justify this lack of humanity extended even to the Supreme Court which, on reviewing the case of Dred Scott, a man classified as slave in one state and free man in another, declared that black people were "of an inferior order, and altogether unfit to associate with the white race"/4\ and refused to extend the protection of the United States Constitution to them.

Blacks lived in the South under slavery until 1863 and it took a bloody civil war to free them. Following the Civil War, the United States adopted the thirteenth, fourteenth and fifteenth amendments to the Constitution, repudiating slavery and inequality in sweeping terms. Reconstruction had its day. Newly freed blacks were soon burdened with Jim Crow laws explicitly circumscribing them in every conceivable aspect of human activity. To be sure, Congress enacted a series of post civil war statutes providing for greater racial equity, but these were largely unenforced. Blacks were born in segregated neighborhoods,/5\ went to segregated schools, and were buried in segregated cemeteries.

The latter half of the nineteenth century seemed to be one for rest and recovery. The Civil War was not easy on the nation, and former slaves seemed fully occupied adjusting to their new status, with few resources with which to challenge the appalling inequities they faced as free citizens. Most importantly, these new citizens gave priority to overcoming almost universal illiteracy among their people. Only after this task was accomplished could they proceed to the political activism that would be needed to combat the inequality that they faced.

The Road to Brown v. Board of Education

By the beginning of this century, many Blacks had become literate; some were very well educated. For them, the time for social reform had come. The National

Association for the Advancement of Colored People (NAACP) became the prime mover in a diligent effort to overcome Jim Crow laws and similar restrictions. The NAACP was founded in 1909 in response to appalling race riots in Springfield, Illinois the year before./6\ For the first half of this century, it sought redress through legislation, executive action, and judicial processes. The courts were the most responsive, but even here, rights gained were limited to narrow, specific situations./7\

Despite the limitations of the judicial process, the NAACP turned its efforts to litigation quite soon after its founding. The first legal cases attacked the worst vestiges of slavery -- peonage -- as well as cases involving extradition and police brutality, but as early as 1911, the NAACP began working towards equal education opportunity for Blacks./8\ Those early efforts focused on federal legislation -- opposing discriminatory elements in federal aid programs and lobbying for new programs./9\

During this era, small gains towards equal educational opportunity were made in a series of cases decided by the Supreme Court from 1938 to 1950, where the Court ordered the admission of Blacks to all-white graduate schools./10\ In the last of these postsecondary cases, the Court ordered the University of Oklahoma, which had admitted a black student, to treat him like any other student./11\ The school had assigned him to a separate row in classrooms, and to separate tables in the library and the cafeteria. These decisions should have warned segregationists that their days were numbered.

In 1954, however, most Jim Crow laws were still in effect. Thus, the Supreme Court decision in Brown v. Board of Education/12\ shocked many people. In a decision affecting more people than any other Court decision for many years, the Supreme Court struck down all state laws requiring or permitting school segregation, and ordered the South to desegregate its public schools. The "separate but equal"/13\ doctrine was finally put to rest.

The Post-Brown Era

Brown ushered in a new era of intensified activity on the civil rights front. Blacks sought enforcement of the decision, but many southern whites refused to yield gracefully. It was at this juncture that new activist groups emerged. After Martin Luther King's Southern Christian Leadership Conference (SCLC) organized the

Montgomery bus boycott in 1955, non-violent demonstrations became a major vehicle for change. Congress responded with the Voting Rights Act of 1957, passed only days after President Dwight D. Eisenhower ordered federal troops into Little Rock, Arkansas, to enforce the federal court orders for school desegregation./14\

In early 1960, with a lunch-counter sit-in in Greensboro, North Carolina, the civil rights movement adopted a new tactic of mass, nonviolent protest of racial segregation and discriminatory practices. These activities were almost always marred by summary arrests, official and unofficial violence and similar retaliatory measures. As the early 1960's rolled by, the civil rights movement expanded. For the first time, northern whites joined in the more serious activities. The Congress on Racial Equality (CORE) organized the first freedom rides, composed largely of racially mixed students. The newly-formed Student Nonviolent Coordinating Committee (SNCC) joined the movement. And King's SCLC gained momentum,/15\ becoming active in every major city in the Deep South -- Birmingham, Atlanta, Jackson, Selma, and many more.

These efforts called national attention to the deeply rooted racial prejudices of the nation, often at the price of bloodshed. The role of martyrs grew. On June 12, 1963, Medgar Evers, then field secretary for the NAACP in Mississippi, was shot to death in his own driveway in Jackson, Mississippi. His funeral brought huge numbers of people to Jackson, and was nearly the stage for a major riot, had not John Doar, the head of the Civil Rights Division of the Justice Department, and an unidentified black youth, succeeded in calming the crowd./16\

Then, on September 15, 1963 somebody bombed a black church in Birmingham. At the time, churches had been heavily involved in the Civil Rights movement. Attempts by Blacks and Whites to attend church together were often met with violence. In this particular bombing, four little girls were killed. Authorities failed to solve the crime; many doubt that local law enforcement authorities tried very hard.

The murder of three young civil rights workers -- Michael Henry Schwerner, James Earl Chaney, and Andrew Goodman -- by members of the Klu Klux Klan further shocked the nation./17\ The three were returning from an investigation of another burned black church. They were stopped by a deputy sheriff who was also a Klansman, for speeding. They were held briefly in

Philadelphia, Mississippi, and taken to a secluded rural area. The three were killed by shotgun; and buried in shallow graves. Chaney, the one Black in the group, had been brutally beaten.

On a spring evening in 1965, following a SCLC-organized march, a Massachusetts resident, Rev. James Reeb, age 38, and father of four, was brutally clubbed in the streets of Selma, Alabama. Two days later he died. The incident received national and local attention -- with banner headlines in the Boston papers./18\ Gestures of support came from high officials -- after Reeb died, Lieutenant Governor Richardson of Massachusetts personally flew to Selma./19\ The presidential plane flew Reeb's widow from Selma to Boston./20\ As will be discussed below, Reeb's state of Massachusetts was among the first to enact a racial imbalance law -- preceding congressional efforts, and extending much greater regulatory control over segregated schooling than any federal efforts.

These were among many similar incidents involving brutal beatings, murder and violence towards old and young, black and white, the famous and the relatively unknown participants in the civil rights movement./21\ Ultimately, however, the violent resistance of Southern segregationists only galvanized the nation including much of the South, into a firmer resolution to end segregation and racial inequality.

Other Minorities: Immigration And Language Isolation

Hispanics today comprise the second largest minority population enrolled in the public schools; they represent 16% of the total public school population in 1980. In many ways Hispanics have faced less severe discrimination, compared to Blacks. They never had to face the extreme violence faced by Blacks when seeking equality. Nonetheless, they have faced racial animosity and de jure segregation from the beginning of their experience as citizens in this country. They also must face the problems faced by any immigrant population. The recent wave of immigration of Hispanics in this country has brought with it a unique set of problems.

Isolated by poverty and by language barriers, the new Hispanics tend to concentrate in border states and cities. In those areas, the fast rate of immigration severely burdens the ability of the local schools to meet the needs of the new students, let alone to attempt

to achieve any kind of racial balance. As a result, Hispanics today experience greater segregation in the schools than do Blacks./22\

Not all Hispanics are new immigrants. They were among the original settlers in the Southwestern United States -- especially Texas. In 1900, nine of ten Mexican Americans lived in Texas./23\ Mexicans were also among the original settlers of Arizona, southern California and New Mexico. Social life revolved around the barrio, where schooling was considered the full responsibility of the local government. At the time, Anglos still heavily relied on private schools or home instruction, and were just beginning to understand the barrio approach./24\

Hispanics made some progress in these early days. The Texas constitution of 1836 had declared all people except Blacks and Indians citizens./26\ "Citizens," thus, included the native Mexicans of Texas, who were called Tejanos. In fact, during the state constitutional convention, the word "white" was rejected as a prerequisite for voting, as it might exclude the Tejanos.

Although they were willing to let the Tejanos vote, most Texans regarded them as inferior. Stephen F. Austin called them the "mongrel Spanish-Indian." As time went by, and public education became an Anglo concept, Anglo authorities turned to segregated schools for the Tejanos./26\

Perhaps even more significant was the fact that Anglos also retained control of government. For example, in the heavily Hispanic town of San Antonio only Anglos served as school board members up through 1948./27\ Other states with Mexican American populations were similar. California schools were designated as exclusively for Mexican Americans, regardless of their English language competence./28\

THE LEGAL CONTEXT FOR STATE RESPONSIBILITY

The Federal Constitution and State Liability

For the first 20 years following Brown, federal desegregation suits were typically a matter between local plaintiffs and local school districts. As education was widely regarded as a local matter, parties simply did not look to state government for relief. However, in the 1970's plaintiffs became more intensely

interested in obtaining metropolitan-wide desegregation remedies, and pressed to include the state as a defendant, as one way to obtain such relief. If the state itself were guilty of violating the equal protection clause, the remedy could transcend a school district boundary, or so the reasoning went.

In the 1980's plaintiffs became very interested in the financial contribution a state might be able to make to any desegregation effort, and pressed even harder to involve state government agencies in the desegregation plans. In determining the extent of state liability under the federal Constitution, courts drew from principles developed in cases against local districts. Some of these general requirements and their relevance to state liability are discussed here.

Most desegregation suits charge a violation of the equal protection clause of the fourteenth amendment. Its language is broad and general: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Since it first found a violation of this clause in Brown v. Board of Education, the United States Supreme Court has developed many corollaries to the equal protection principle. Although Brown focused on the responsibilities of local school districts to remedy past wrongs, its general rules apply to state agencies as well.

The Requirement of State Action

In fact, a very narrow reading of the fourteenth amendment might limit it to states: it is directed only to "state" action. But this includes local governments, which are considered creatures of the state. It does not include private citizens.

In a very early examination of the equal protection clause, in the Civil Rights Cases,/29\ the United States Supreme Court struck down a federal law that would have made it illegal to discriminate racially among patrons of privately operated inns, transportation facilities and places of amusement. Although the fourteenth amendment expressly authorizes Congress to enforce its requirements, the Court found that this authority was limited by the amendment's language prohibiting only states from denying equal protection. Since that time, Congress has extended civil rights laws to the private sector, but it has invoked its authority to regulate interstate commerce, rather than the equal protection clause. The Court has approved the use of the interstate commerce clause for this purpose./30\ The

requirement of state action limits the applicability of the fourteenth amendment to state and local government agencies, and to schools that are supported by government funds.

The Requirement of Intent

Under federal constitutional law, intent to discriminate is an essential part of a violation. The Supreme Court has rejected the argument that public agencies should be responsible for correcting racial imbalance due to causes beyond their control. In other words, the public agency is responsible for de jure segregation only, and is not responsible for de facto segregation. The fourteenth amendment suggests this principle, by indicating that "[n]o state shall . . . deny . . . equal protection" -- language that suggests intentional acts of denial.

Proof of intentional discrimination in Brown was a very easy matter. Plaintiffs had only to point to a blatant Jim Crow law to make their case. After Brown plaintiffs had to show manipulation of attendance lines, failure to relieve overcrowding at a one-race school, a liberal student transfer policy that exacerbated racial imbalance, and other acts that provide circumstantial evidence of wrongful intent./31\ To implicate state agencies in a desegregation case, plaintiffs must show that state policies or actions were designed to promote and continue racial imbalance in local district schools.

It would seem that any state that had at one time adopted a law that required segregated schools has provided the necessary evidence of wrongful intent at the state level, provided that the present inequities in a system can be traced to that state law. However, for reasons that will be discussed below, courts have not imposed extensive remedial responsibility on states simply because they once had such laws.

In the absence of segregationist laws, as noted, states may be liable, where intent to promote segregation can be established by circumstantial evidence. Although the Supreme Court did not specifically discuss the case against Ohio in Columbus Board of Education v. Penick, it did affirm the lower court's decision, including a finding of state liability. The federal court in the Southern District of Ohio and the Sixth Circuit had both found the requisite intent, based upon state board knowledge of illegal acts at the local level, coupled with a failure to take action on them (while taking action against local boards for other legal violations,

such as those relating to curriculum standards) and the provision of continuing support to the local board./32\ The Supreme Court also affirmed the case against the state of Michigan, for segregation in Detroit, again without commenting in any detail on what is needed to establish segregationist intent./33\ Among other things, Michigan had passed a law blocking the voluntary desegregation of Detroit, and had supported a school construction program that exacerbated racial segregation in the Detroit schools.

Elimination of Segregation "Root and Branch"

In Green v. County School Board, the High Court issued its now famous mandate that a desegregation remedy must achieve "a unitary system in which racial discrimination would be eliminated root and branch."/34\ Although Green focused on a case against a local district, it has important implications for states. If states once required segregated schools by law, for example, then they are responsible for the elimination of the effects of that law -- "root and branch." Because of this requirement, the Court may require states to fund compensatory education programs designed to alleviate the detrimental effects of prior segregated schooling./35\ Thus, in the Detroit case, the Court affirmed an order requiring Michigan to fund comprehensive remedial programs in reading and communications skills, in-service training for personnel, testing, counseling and a large part of the cost of new bus purchases./35\ However, the state does not have to eliminate that part of the racial imbalance for which it is blameless, as discussed in the next section.

Restrictions on the Scope of the Remedy. Parties in desegregation suits have always fought fierce battles over the geographic area to be included in a court's remedial order. Plaintiffs typically seek to expand the area, hoping to include suburban districts, in order to achieve better racial balance for minority children living in the central city. Defendants generally seek to limit the geographic scope of a court order. In Milliken v. Bradley,/36\ the Detroit case, the Supreme Court reviewed a lower court order affecting 54 school districts in the Detroit metropolitan area. Focusing on the lack of evidence inculpating the school districts outside Detroit,/37\ and only limited state involvement in the illegal system,/38\ the Court held the plan invalid, stating that "the scope of the remedy is determined by the nature and extent of the constitutional violation."/39\ As there was no

interdistrict impact traceable to the illegal state action, the Court was unwilling to approve a metropolitan-wide remedy.

As already noted, three years after it first reviewed the case against the state of Michigan, the Supreme Court considered it again. In the second case (Milliken II), the Court approved an order requiring it to pay half the cost of development and implementation of compensatory and remedial programs designed to correct the effects of past discrimination in Detroit./40\ This the Court saw as more appropriate, given the nature of the state's involvement in the illegal scheme.

A Racially Neutral Policy

After all vestiges of segregation are removed, the administration of the public schools must eventually be based upon racially neutral policies. When this goal is achieved, the responsible governments have complied with the Constitution, even if racial imbalance reappears as a result of causes beyond the control of school officials. The Court first dealt with this requirement in Swann v. Charlotte-Mecklenburg Board of Education./41\ The Court approved the use of racial quotas in this case, but not without cautionary words. Quotas, the Court held, may be necessary to eliminate the effects of past discrimination, but they should be considered temporary in nature:

> It does not follow that the communities served . . . will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system./42\

The Court reinforced this principle in a case involving Pasadena, California. A trial court had adjusted its order to avoid the development of a black majority in any of Pasadena's schools, although there was no evidence of new wrongdoing on the part of school officials. To the contrary, the evidence indicated that some schools were becoming majority-black because of demographic causes. The Supreme Court reversed, observing that once the court implemented a racially neutral scheme, it "had fully performed its function of

providing an appropriate remedy for previous racially discriminatory attendance patterns."/43\

An End to Court Supervision

A clear corollary to the Swann and Pasadena cases is that court supervision must end when the effects of past discrimination have been eliminated./44\ Further, if plaintiffs have brought suit based upon illegal practices many years before, it is possible that the effects of these illegal practices taking places have been eliminated without court order. Courts have no authority under the constitution to correct existing racial imbalance if it cannot be traced to these prior illegal acts. In Bradley v. School Board of the City of Richmond, for example, a trial court ordered an extensive interdistrict remedy, premised in large part upon state culpability prior to Brown. The appellate court reversed, holding that the effects of this early wrongdoing had long since dissipated./45\ An equally divided Supreme Court affirmed the appellate court, without an opinion./46\ While the lack of an opinion leaves no clue to the High Court's thinking, the case does suggest that those states that once had state laws requiring segregated schools are not automatically liable in segregation suits brought today.

A Review of Lower Court Decisions

Lower courts have applied the above principles in an increasing number of cases. State culpability has been used to support both interdistrict remedies and orders requiring the state to help fund desegregation efforts and remedial programs. The Detroit case has already been discussed, as it went to the United States Supreme Court. Also as already noted, a district court in Ohio, affirmed by the Sixth Circuit, has found the state of Ohio liable for segregation in Columbus. Subsequently, Ohio was held jointly liable with the local board. and is now obligated to pay its share of the costs of desegregating Columbus./47\

Ohio was again found liable in the Cleveland case, Reed v. Rhodes. In earlier proceedings, the Sixth Circuit reviewed the case and remanded it to the district court, indicating that there must be more detailed evidence that state officials intentionally supported segregationist policies of the local district./48\ On remand, the trial court found the state liable, based upon state awareness of local illegal policies, and earlier segregationist requirements in the state

constitution and state statutes, and a failure to act in this area (while taking action against local districts in nonequity areas)./49\

Federal courts found the state of Indiana liable in a case involving Indianapolis, United States v. Board of School Commissioners,/50\ and determined that this justified a metropolitan remedy. State complicity in the segregated schooling was based on a history of intentional segregation beginning in 1800, and including both housing and school segregation, as well as state control over education./51\ In subsequent proceedings, the district and appellate courts required the state to pay all the costs of interdistrict transfer programs, based on the state's exclusive responsibility for interdistrict segregation./52\ The district court ordered the Indiana general assembly to reorganize the Indianapolis area school districts or establish an interdistrict transfer program. When the General Assembly failed to act, the court imposed a one-way city to suburb transfer program affecting 6,000 black children.

In 1980 the district court decided that the state of Missouri had intentionally contributed to the racial segregation of the public schools in St. Louis, and ordered state participation in the remedy. U.S. District Court Judge James H. Meredith ordered Missouri to pay half the cost of the desegregation plan -- projected at $22 million./53\

The court also ordered the state to take responsibility for long range planning for desegregation of the St. Louis area and for desegregation of city and county vocational education programs. Finally, the court ordered the state to develop an interdistrict desegregation plan and to work with the St. Louis Community Development Agency in developing a plan for operating federally assisted housing programs in a way that would enhance school integration./54\ Orfield cites exemplary state policies in some states that have curtailed "snob zoning ordinances" -- local laws designed to keep the poor out of some municipalities, and which usually contribute to interdistrict racial imbalance.

In the Wilmington case, Evans v. Buchanan, the trial court required the Delaware legislature to reorganize the Wilmington and New Castle County Schools, and indicated that if it failed to do so, the court would fill the breach. The Third Circuit affirmed. The lower court had ordered remedial programs, in-service training, curriculum modification, guidance counseling,

and other remedial action similar to the order against Michigan in the Detroit case./55\ The court even imposed an adjustment to the tax rate, but this aspect of the order was modified by the appellate court./56\ In a 1974 case, the evidence against the state was based upon de jure segregation taking place prior to Brown v. Board of Education./57\ In subsequent proceedings, a three judge district federal court investigated the impact of state action on interdistrict racial segregation, and found it to be substantial -- enough to meet the standard set out in Milliken I./58\ Thus, the court placed the responsibility for interdistrict remedies on the state./59\

In Berry v. Benton Harbor,/60\ the state of Michigan sought to vacate an order requiring it to fund portions of an interdistrict desegregation plan. The state argued that, that, under state law, it cannot pay per pupil aid to both the "sending" and "receiving" districts because the interdistrict student transfers are to be voluntary under the plan. The judge held that while student participation is voluntary, participation by the state and district defendants is mandatory, and refused Michigan's request.

Other cases are scattered around the county. Tennessee has been found liable for segregation in Nashville./61\ The state of California has agreed to finance a portion of the plan to desegregate San Francisco,/62\ and New York is a defendant in a case against Buffalo./63\

In sum, state liability must be predicated upon intentionally discriminatory state policies, but these have been established through reference to prior segregationist law,/64\ provided the impact of those laws is still felt today./65\ In addition, state knowledge of illegal segregation at the local level is relevant, although something more than mere knowledge is necessary./66\ This knowledge, coupled with a failure to take corrective action (while taking action against local districts on other matters), and supervisory power to act, have resulted in state liability./67\

THE GOAL OF INTEGRATED SCHOOLING

Serving the unserved and the underserved increases the economic and human potential of the entire nation. As those children who receive an inadequate education become better educated, they will be able to move into the work force. Today, with a shortage of people to

fill jobs in industries that require technical knowledge of computers and other advanced systems, the entire economy will benefit if all children are adequately served by the education system.

There are many ways to do this. The traditional concern for racial minorities has focused on the elimination of segregation, and the lingering effects of illegal segregation of the past. The second paper in this series discusses the impact of desegregation on student achievement, and finds that this traditional approach may have some value. Often, however, desegregation efforts are thwarted by tracking and other methods of segregating children once they are assigned to a desegregated school. Regardless of the education outcomes for these children, however, legal and historical imperatives require that desegregation efforts continue to go forward. There is no escaping the legal liability, if a government has practiced intentional segregation in the past. The research on student achievement is best used as a diagnostic tool, helping school officials to identify those populations that may require special support during a desegregation effort. Finally, the practice of tracking, or relatively early and permanent assignment to ability groups, appears to impede the progress of lower tracks, while providing little benefit to students in the higher tracks. Classroom integration and serving the underserved are compatible goals.

The paper by Winslow and others, the third in this series, discusses the potential of state government for promoting desegregation at the local level. Desegregation history and state strategies for five states are closely examined -- California, Illinois, Massachusetts, Kentucky and Washington. The examination reveals successes and failures within every state. In the long term, state agencies responsible for school desegregation appear to be committed and vigorous. Reduced resources may threaten their capacity to continue, however. In all of the states examined there were state laws providing the state agency with considerable power. Generally, state law made racial imbalance actionable, even in the absence of an intentional violation. Evidence suggests that these state agencies share considerable concern for the achievement of students, but possess no clear idea of how to enhance achievement levels. Yet, virtually everyone involved believed that the twin goals of desegregation and quality education could be achieved.

Interestingly, state policies and procedures appear to focus chiefly on pupil assignment and not on the

supportive actions that can be taken to enhance achievement in an integrated setting. Perhaps the goal of physical desegregation provides sufficient challenge for state agencies responsible for equity in education. Yet, focusing on the elimination of tracking and desegregation at an early age -- just two of the aspects of successful desegregation plans -- seems within the grasp of state agencies.

The paper by Orfield explores ways to achieve this relatively simple goal of correcting pupil assignment patterns -- through more sensible public housing policies. Orfield points out numerous ways in which some states have achieved better integrated schools through attention to public policies that affect the decision as to where people will live. He observes shifts in federal policy toward urban school segregation, as well as urban problems generally, and cautiously applauds the potential for states to take up the slack. The reasonable use of housing subsidy programs can be of great assistance to desegregation goals. In states experiencing rapid development, regulations may also be used to assist in these goals. Control over rules for use of state and local public employee pension funds -- a new source of capital for home financing -- provides another potential tool.

The nature of the problem is changing, however, as times are changing. A new problem of segregation is emerging, as large numbers of immigrants from Mexico and other Hispanic nations to the South and from Asia enter the country. Also, with the emergence of high technology industries as a dominant industry in America, access to training in math and sciences becomes ever more important.

Arias and Bray review the legal and historical concerns for minorities other than Blacks, with an emphasis on the story for Hispanics. They conclude that, although the same legal rules apply to Hispanics as apply to a black minority, language isolation require a different approach. They conclude that non-black racial minorities have a right to a meaningful education; and that this requires specific attention to the needs of those who do not comprehend English well. However, this special attention to language needs cannot be used to permanently segregate these children by race. Where students may benefit from separation while learning English -- typically older students -- this can be made a temporary measure in preparation for the desegregated setting. The authors believe that the goals of integration and attention to the language needs of these children are compatible.

The future issues for equity in education are discussed in the paper by John Lipkin. Lipkin cites a growing body of evidence that access to microcomputers in the schools will be different for poor and minority children than for wealthier, majority children. He cites evidence that female students may not participate in advanced programs for math, science and related activities. Here, again, the classic concern for integration of racial minorities is compatible with the goal of serving the unserved. If these children are well integrated, they are more likely to obtain some of the same advantages made available to their majority-race peers. Equity in the distribution of finances for these forms of education must also be pursued.

Finally, Belsches-Simmons reviews state constitutions and state laws providing for equity in education. She finds a substantial state commitment to this goal. She finds some states that adopted policies before the federal government, and some that have requirements that are stricter than those of the federal government's. In the papers by Orfield and Lipkin, we again find examples of states that are proceeding to remedy problems of inequity -- both the classic problem of racial segregation and the newly emerging problem of access to training in advanced technologies.

In most of these papers, the authors accept a decline in federal commitment to equity in education as an unalterable fact. In most of these papers, the authors believe that state government has the capacity to fill the breach. Even where authors would prefer that policies and enforcement remain primarily a federal responsibility, they now look to the states to see to it that the nation serves the unserved and underserved.

FOOTNOTES

* Copyright Education Commission of the States, 1983.
Patricia Lines is director of the Law and Education Center at the Education Commission of the States. This paper was supported by ECS state fees and general grants from the Carnegie Corporation and the Ford Foundation, and a research grant from the National Institute of Education. The views in this paper are the author's and do not necessarily reflect the positions of these organizations.

1. This is the Task Force's action recommendation number eight, which also contained a provision on dropouts:

> We recommend that each state and local school system -- indeed, the principals, teachers and parents in each school -- launch an energetic program to reduce absenteeism. We recommend further that each state and local community also establish broadly-based community programs to solve the dropout problem. This problem is so severe that in effect, 25 percent of all American young people are denied the opportunity for a complete education. Merely stiffening attendance requirements is not enough; efforts to deal with absenteeism and the dropout problem must also include revitalizing course materials and making educational schedules flexible enough to accommodate students who have special problems.

The student populations discussed in this paper are highly vulnerable to problems associated with nonattendance. However, this specific issue is covered elsewhere. See (Phi Delta Kappan, forthcoming, Fall 1983)

2. 347 U.S. 483 (1954).

3. For detail, see Gary Orfield, State Housing Policy and Urban School Segregation, Education Commission of the States, September, 1983.

4. Dred Scott v. Sanford, 19 How. 393 (1856).

5. Many cities passed ordinances requiring residential segregation. See Charles Flint Kellogg, NAACP; A History of THe National Association for the Advancement of Colored People, vol. I, Johns Hopkins Press, Baltimore, 1967, at 183--187. This practice was declared unconstitutional in Buchanan v. Warley, 245 U.S. 60 (1917).

6. Kellogg, supra note 5, at 3.

7. The most important cases in the first half of the century were probably the voting rights cases. In 1915, the Supreme Court held that a state may not deny the vote to citizens simply because their ancestors were not entitled to vote, and that a state may not require a literacy test for newly registered voters. Guinn v. United States, 238 U.S. 347 (1915). Throughout 1927 to 1953 the Supreme Court reaffirmed the right of Blacks to vote in party primaries. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953). Segregation in interstate commerce was voided at an early date. McCabe v. AT & SF Ry Co., 235 U.S. 151 (1914); Morgan v. Virginia, 328 U.S. 373 (1946). Residential segregation ordinances were voided in Buchanan v. Warley, 245 U.S. 60 (1917). Other cases in which Blacks gained rights through the courts related to restrictive covenants, Shelley v. Kraemer, 334 U.S. 1 (1948); jury selection, Morris v. Alabama, 294 U.S. 587 (1934); and fair trial rights, Moore v. Dempsey, 261 U.S. 86 (1923).

8. Kellogg, supra note 5, at 187.

9. Id. at 188--190.

10. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950).

11. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

12. 347 U.S. 483 (1954).

13. See Plessy v. Ferguson, 163 U.S. 537 (1896) (approving a state law segregating railroad transportation facilities).

14. Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

15. See generally A. Waskow, From Race Riot to Sit-In, 1919 and the 1960's, Doubleday & Co., Garden City, 1966, at 231-33.

16. For a first hand account, see William M. Kunstler, Deep in My Heart, (N.Y.: William Marrow & Co., 1966), at 203-210.

17. The Klansmen involved were ultimately convicted under federal laws prohibiting a conspiracy to deprive anyone of their civil rights. Posey v. United States, 416 F.2d 545 (5th Cir. 1969) (convictions affirmed). See also Kunstler, supra note 16, at 307-323.

18. Boston Globe, Mar. 11, 1965 at 1 (a.m. ed.); Boston Globe, Mar. 12, 1965 at 1 (a.m. ed.). To review editorials and letters to the editors, demonstrations and rallies in Massachusetts cities, see Boston Globe, Mar. 15, 1965, at 1 (a.m. ed.), Boston Globe, Mar. 15, 1965, at 6 (a.m. ed.).

19. Boston Globe, Mar. 12, 1965 at 1 (p.m. ed.).

20. Id.

21. See Kunstler, supra note 16, at 144-153; 211-214.

22. See Orfield, supra note 3.

23. Meyer Weinberg, The Search For Quality Integrated Education, Westport, Ct.: Greenwood Press, 1983, at 1.

24. Id. at 2.

25. Id.

26. Id. at 3.

27. Id. at 5.

28. Id. at 4--5.

29. 109 U.S. 3 (1883).

30. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964).

31. For a discussion of the intent requirement, see Washington v. Davis, 426 U.S. 229 (1976) (employment case).

32. Columbus Board of Educ. v. Penick, 583 F.2d 787 (6th Cir. 1978), aff'd, 443 U.S. 449 (1979). For subsequent proceedings, see 519 F. Supp. 925 (S.D. Ohio 1981), aff'd, 663 F.2d 24 (6th Cir. 1981).

33. See Milliken v. Bradley, 418 U.S. 717 (1964) (Milliken I), and 433 U.S. 267 (1977) (Milliken II).

34. 391 U.S. 430, 437--38 (1968). Accord, Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 15 (1971).

35. Milliken II, 433 U.S. 267 (1977)

36. Milliken I, 418 U.S. 717 (1964).

37. Id. at 745.

38. Id. at 751.

39. Id. at 744. The Court further defined this rule in Dayton Board of Educ. v. Brinkman, 433 U.S. 406, 419 (1977), where it stated that "only if there has been a systemwide impact may there be a systemwide remedy."

40. Milliken II, 433 U.S. 267 (1977).

41. 402 U.S. 1 (1971).

42. 402 U.S. at 31. This was not dictum, as the Court indicated that it would have reversed the trial court had it imposed permanent quotas. Id. at 24.

43. Pasadena City Board of Educ. v. Spangler, 427 U.S. 424 (1967). See also Vetterli v. United States District Court, 435 U.S. 1304 (1978) (Rehnquist J., sitting as Circuit Justice).

44. See e.g., Singleton v. Jackson Munic. Separate School Dist., 541 F. Supp. 904 (S.D. Miss. 1981); Calhoun v. Cook, 522 F.2d 717, 719 (5th Cir. 1975).

45. Bradley v. School Board, 462 F.2d 1058 (4th Cir. 1958), aff'd, 412 U.S. 92 (1973). The court held that the "last vestiges of state imposed segregation have been wiped out in the public schools of the city of Richmond" and the two adjacent counties. Id. at 1070.

46. 412 U.S. 92 (1973).

47. Penick v. Columbus Board of Educ., 519 F. Supp. 925, 663 F.2d 24 (6th Cir. 1981). For earlier

proceedings, see 583 F.2d 787 (6th Cir. 1978), aff'd, 443 U.S. 449 (1979).

48. Reed v. Rhodes, 607 F.2d 714, 718 (6th Cir. 1979).

49. 500 F. Supp. 404 (N.D. Ohio 1980), aff'd, 662 F.2d 24 (6th Cir. 1981).

50. 368 F. Supp. 1199 (S.D. Ind. 1973), aff'd, 637 F.2d 1101 (7th Cir. 1980). In Indianapolis, the Seventh Circuit also approved a decision to enjoin the location of public housing projects, which tended to attract Blacks, within the Indianapolis school district boundaries. (April 25, 1980 case)

51. 368 F. Supp. at 1199--1204.

52. United States v. Board of School Comm'rs, 456 F. Supp. 183 (S.D. Ind. 1978), aff'd, 677 F.2d 1185 (7th Cir. 1982), cert. denied sub nom. Orr v. Board of Comm'rs, 103 S. Ct. 568 (1982).

53. Liddell v. Board of Educ. of St. Louis, 491 F. Supp. 351 (E.D. 1980), aff'd, 677 F.2d 643 (8th Cir.), cert. denied, 454 U.S. 1081 (1981).

54. Id.

55. Evans v. Buchanan, 447 F. Supp. 982 (D. Del.), aff'd with modifications, 582 F.2d 750 (3rd Cir. 1978).

56. 582 F.2d 750, 779 (3rd Cir. 1978).

57. 379 F. Supp. 1218 (D. Del. 1974).

58. 393 F. Supp. 428 (D. Del. 1975) (three judge court), aff'd per curiam, 423 U.S. 963 (1975).

59. 416 F. Supp. 328, 339, 357 (D. Del. 1976), appeal dismissed for want of jurisdiction, 429 U.S. 973 (1976), district court decision aff'd, 555 F.2d 373 (3rd Cir. 1977), cert. denied, 434 U.S. 880 (1977).

60. 564 F.Supp. 617 (W.D. Mich. 1983).

61. Kelly v. Metropolitan County Board, 558 F. Supp. 468 (D. Tenn. 1983). See also 511 F. Supp. 1363 (1981) and 492 F. Supp. 167. The Sixth Circuit had sent the case back to the district in 1982 because it had failed to design a sufficiently comprehensive plan. 687 F.2d 81 (6th Cir. 1982), cert. denied, 103 S.Ct. 834 (1983).

62. San Francisco NAACP v. San Francisco Unified School Dist., No. C-78-1445WHO, N.D. Cal., Dec. 30, 1982.

63. The most recent decision in this nine year old case is reported at Arthur v. Nyquist, No. Civ-1972-32 (W.D.N.Y. 1983). Plaintiffs sought to require the school board to devise a new plan to increase the number of majority students at three remaining racially-identifiable minority schools. The board contended that its existing plan achieved the maximum feasible level of system-wide desegregation. In denying the plaintiff's motion, the court noted the success of the other elements of the plan and the failure of plaintiffs to propose an alternative to the school board's plan.

64. E.g., Columbus Board of Educ. v. Penick, 663 F.2d 74, 27 (6th Cir. 1981); Liddell v. Board of Educ., 469 F. Supp. 1304 (E.D. Mo. 1979), rev'd and rem'd for stronger remedy sub nom., Adams v. United States, 620 F.2d 1277 (8th Cir. 1980).

65. See the discussion of the Richmond case, at notes 45 and 46, supra.

66. Oliver v. Kalamazoo Board of Educ., 368 F. Supp. 143 (W.D. Mich. 1973), aff'd, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975);

67. Reed v. Rhodes, 607 F.2d 714, 718 (6th Cir. 1979); Columbus Board of Educ. v. Penick, 663 F.2d 24, 26 (6th Cir. 1981); Liddell v. Board of Educ., 469 F. Supp. 1304 (E.D. Mo. 1979), rev'd and rem'd for stronger remedy sub nom., Adams v. United States, 620 F.2d 127[illegible] (8th Cir. 1980).